

***Locus Standi* of the Right to an Adequate Environment – Universal and Regional Human Rights Mechanisms**

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Article Information*

Research Article • UDC: 37.016-053.5-056.26/.36

Volume: 20, Issue: 2, pages: 1–16

Received: April 13, 2023 • Accepted: ' 55 0 / , 2023

<https://doi.org/10.51738/Kpolisa2023.20.2r.1msm>

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We have no known conflict of interest to disclose.

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* Cite (APA):

Mladenov, M., Stefanović, N., & Marković, S. (2023). *Locus standi* of the right to an adequate environment – Universal and regional human rights mechanisms. *Kultura polisa*, 20(2), 1–16. <https://doi.org/10.51738/Kpolisa2023.20.2r.1msm>



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Abstract

Despite that the right to an adequate environment is an integral part of international law for more than 50 years, there are still numerous challenges to its effective judicial protection. Among the issues affecting the right is proper entitlement to raise a claim with respect to the right, as well as those relating to justiciability, procedure, interpretation and effective remedies. In light of the aforementioned, the paper will contribute to the ongoing discussion by providing analysis and insights into the main features, admissibility criteria, and compliance procedures related to the right to an adequate environment before international and regional judicial and quasi-judicial entities. The scope of the paper is to clarify how the right to an adequate environment can be assessed in regard to effective judicial protection, legal remedies applied and, consequently, the coherence that the judicial brings to the global legal order.

Keywords: the right to an adequate environment, *locus standi*, admissibility criteria

Locus Standi of the Right to an Adequate Environment – Universal and Regional Human Rights Mechanisms

International human rights law recognizes duties and rights toward individuals (Bjelajac, 2017, p. 143). However, without adequate access of individuals to international justice, provisions of human rights treaties are nothing more than “dead letters” (Ribeiro, 2010, p. 68). Therefore, a central issue of the effectiveness of human rights law is referring to individual complaint mechanisms (Van Aaken, 2005, p. 4). One of the most crucial aspects of complaint mechanisms is *locus standi* which determines the proper entitlement to raise a claim under a specific instrument.

The right to an adequate environment (hereinafter: RtAE) as a human right is an integral part of international law for more than 50 years there are still numerous challenges to its effective judicial protection (Arsić et al., 2011, p. 25). First of all, there is no consensus on whether should we treat the RtAE as an autonomous right, or is it, on the contrary, considered through the prism of a more general human rights narrative (Mladenov & Serotila, 2022, p. 53). We support the theoretical position according to “the right to environment encompasses both the substantive right to environmental quality and overlaps with other recognized human rights” (Collins, 2007, pp. 126–127). Therefore, the framework of the research will include human rights treaties that provide explicit protection of the RtAE as well as treaties that indirectly contribute to the protection of the subject right. In addition, among the issues affecting the RtAE is proper entitlement to raise a claim concerning the right as well as those relating to justiciability, procedure, interpretation and effective remedies.

In light of the aforementioned, the paper will contribute to the ongoing discussion by providing analysis and insights into the main features, admissibility criteria, and compliance procedures related to the RtAE before international and regional judicial and quasi-judicial entities. The scope of the paper is to clarify how the RtAE can be assessed regarding effective judicial protection, legal remedies applied and, consequently, the coherence that the judicial brings to the global legal order.

Universal Human Rights Mechanisms

Universal human rights treaties do not have an express provision for the RtAE. However, a number of treaties include an indirect reference to this right within the scope of the rights to life, health, food, water, private life, housing, culture, and development. Within this context, the subject of the research will be the International Covenant on Civil and Political Rights [ICCPR] and the International Covenant on Economic, Social and Cultural Rights [ICESCR] as the most significant universal treaties in this field.

International Covenant on Civil and Political Rights

Even though the ICCPR does not explicitly recognize the RtAE, the Human Rights Committee [HRC], the monitoring body created by the ICCPR to oversee the implementation of its provisions, has identified human rights that were infringed or threatened by environmental harm (International Covenant on Civil and Political Rights, 1966). HRC statements on human rights affected by environmental impacts have most frequently invoked the rights of minorities – and, particularly, indigenous peoples in accordance with Article 27 of the ICCPR. Other rights discussed in the same manner are the right to life, the right to respect for private and family life, home and correspondence, the right of people to self-determination and the right to equality before the law and equal protection (Kiss & Shelton, 2021, pp. 681–723).

According to the main scope of this article, the admissibility *ratione personae* is of primary interest. The First Optional Protocol to the ICCPR addresses the authority of the HRC to consider “communications from individuals subject to its jurisdiction who claim to be victims of a violation” (Optional Protocol to the International Covenant on Civil and Political Rights, 1966). To claim to be a victim of a violation of the ICCPR right, an individual or group of individuals must establish that either a State Party’s act or omission has adversely affected her enjoyment of the right protected by the ICCPR (Steiner, 2000, pp. 33–37). A legal person or non-governmental organization (on its behalf) could not be considered a victim nor *actio popularis* is allowed.

Regarding the *ratione temporis* standard, the alleged violation of human rights must have occurred after the entry into force of the

complaint mechanism for the state party concerned or could have occurred before the complaint procedure's implementation entry into force and continued later. The First Optional Protocol to the ICCPR does not provide a time limit to submit a communication to HRC. To prevent any abuse in this respect, the HRC established a standard regarding submission delays according to which when a complaint is filed five years after domestic remedies have been exhausted or, where applicable, three years after the conclusion of another international investigation or settlement procedure, there may be abuse, unless there are reasons justifying the delay in light of all the circumstances of the case (Rules of Procedure of the Human Rights Committee, 2021, rule 99 (c)).

With respect to the *lis pendens* rule, the HCR cannot consider a complaint that is under the process of examination or that has already been examined by another international body or regional court. This regulation is intended to prevent forum conflicts and treaty bodies serving as appellate bodies, particularly in the case of regional courts.

Regarding the interim measures, when communication is submitted, the HRC may request the State party to take measures to protect the alleged victim from irreparable damage. Concerning the enforcement procedure, the primary goal of the individual communication procedures in most cases is to provide redress and reparation to complainants whose ICCPR rights have been violated. The HRC further demands that the State party submit information on the action taken to adopt the recommendations and remedy the situation within a particular time frame (Callejon et al. 2019, p. 20).

The fact that only 12% of the HRC's decisions were implemented in the member states clearly indicates the inefficiency of this system, especially in the context of the right to an adequate environment, which due to its transboundary nature would inevitably require precise protection at the universal level (Tubić, 2019, p. 1192).

International Covenant on Economic, Social and Cultural Rights

The Committee on Economic, Social and Cultural Rights [CESCR], the body that supervises compliance with the ICESCR, acknowledged that the enjoyment of various human rights protected by the ICESCR

depends on a healthy environment (International Covenant on Economic, Social and Cultural Rights, 1966). According to the practice of the CESCR regarding the impact of environmental harm, the following human rights are most affected: the right to an adequate standard of living, including the rights to adequate housing, adequate food, and safe and clean drinking water and sanitation and the right to the highest attainable standard of physical and mental health (Mladenov, 2017, p. 104).

The Optional Protocol to the ICESCR, which entered into force in 2013, gives the CESCR the authority to accept and analyze communications from individuals alleging violations of their ICESCR rights (Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, 2008). Individual communications procedure before the CESCR is almost the same as before the HRC. Like the HRC, the CESCR holds on to the victim requirement and does not permit *actio popularis* or NGO complaints. The Optional Protocol to the ICESCR establishes a time limit for complaints to be submitted to the CESCR. Unless the author can demonstrate that it was impossible to do so, a complaint must be filed within one year of exhausting all domestic remedies. The same standards regarding *ratione materiae* and *lis pendens* rule as before the HRC apply here.

Even though the procedures before the HRC and CESCR are almost identical, the committees' approach toward remedies has been different. The CESCR makes a clear distinction between "recommendations in respect of the author" and "general recommendations". The most awarded remedy is compensation. The CESCR has issued highly detailed remedies and compensation measures in some circumstances, such as restitution of legal costs, lost income, housing, and psychological support (Callejon et al. 2019, p. 10).

Despite the fact that the CESCR focuses particularly on legal remedies, insufficient efficiency in the context of protection of the right to an adequate environment is evidenced due to legally non-binding decisions made by this body, as well as strict conditions regarding the admissibility criteria.

Regional Human Rights Mechanisms

Locus standi of the RtAE before the regional human rights courts will be analysed within the framework of the African, Inter-American and European systems of human rights protection.¹

African System of Human Rights Protection

The African Charter on Human and Peoples' Rights [African Charter] in Article 24 states that "all peoples shall have the right to a general satisfactory environment favourable to their development" (African Charter on Human and Peoples' Rights, 1981). African Charter establishes the subject right as a collective people's right. In addition, the African Commission on Human and Peoples' Rights (hereinafter: ACHPR), the body that supervises compliance with the Charter, has found that the following human rights could be threatened by environmental harm: the right to life, the right to property, the right to health, protection of the family and the right to dispose of natural resources (Mladenov, 2017, p. 186).

The mandate of the ACHPR is defined by Article 45 of the African Charter which includes the promotion and protection of human and peoples' rights under the Charter and interpretation of the Charter at the request of a State Party. Anyone can submit a complaint to the ACHPR alleging that one or more of the human rights under the African Charter have been violated. The ACHPR's decisions are significant in determining the *locus standi* under the African Charter due to the fact that there is no prerequisite for a victim requirement. Individual and group complaints are accepted by the ACHPR, as well as altruistic NGO complaints on behalf of named victims or NGO complaints alleging human rights violations without naming the victims. It seems acceptable to argue that the ACHPR enables *actio popularis* in theory (Van Aaken, 2005, p. 43).

African Court on Human and People's Rights [ACHPR Court] has

¹ The effectiveness of the European system of human rights protection is largely due to the ECtHR. Therefore, the European Perspective will only include the jurisprudence of this court.

been established by the Protocol to African Charter which entered into force in 2004 (Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 1998). The Protocol provides that the ground for the complaints before the ACHPR Court may be the African Charter as well as other human rights treaties ratified by the State Party concerned. The Court can only deal with cases submitted against Countries that have ratified the Protocol involving allegations of human rights that must have taken place in the State in question. The ACHPR and the ACHPR Court form a complementary system of regional human rights protection (Rules of Procedure of the African Commission on Human and Peoples' Rights, 2020, Rule 128.) In accordance with the Article 5 of the Protocol the ACHPR Court may accept communications from the following parties:

the African Commission, the State Party which had lodged a complaint to the Commission, the State Party against which the complaint has been lodged at the Commission, the State Party whose citizen is a victim of human rights violation, and African Intergovernmental Organizations (Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 1998, Article 5).

If the ACPHR Court determines that protected rights have been violated, it must prescribe an appropriate remedy, which may include fair compensation or reparation.²

² In 2014 the AU adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights which created an African Court of Justice and Human and Peoples' Rights (ACtJHPR). This court should merge the ACHPR Court and the African Court of Justice, but it has not yet been set up (See Murray, R. (2019). The Human Rights Jurisdiction of the African Court of Justice and Human and Peoples' Rights. In C. Jalloh, K. Clarke, & V. Nmehielle (Eds.), *The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges*, Cambridge University Press, 965–988.)

According to the above analysis, the *locus standi* of the right to an adequate environment in the African human rights protection system is primarily determined by the fact that the right in question is envisaged as a collective right of the people as well as by the impossibility of its effective protection by an individual.

Inter-American System of Human Rights Protection

The San Salvador Protocol to the 1969 American Convention of Human Rights provides explicit protection of the RtAE in Article 11 (Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, 1988). The real impact of Article 11 regarding the formulation of the RtAE as an independent human right, is significantly reduced because individuals and groups cannot bring complaints to the Inter-American Commission on Human Rights based on alleged violations of this article. However, the protection of the subject right is indirectly provided within the Inter-American human rights system, through the recognition of violations of other human rights on the ground of the environmental degradation under the provisions of the American Convention on Human Rights that proclaim the right to life, the right to property, the right to health, and most often in the context of the rights of indigenous peoples (Bratspies, 2015, p. 52).

The Inter-American human rights system is based on two monitoring bodies: the Inter-American Commission on Human Rights [IACHR] and the Inter-American Court of Human Rights [IAC]. The IACHR examines, among other things, complaints submitted by individuals alleging a violation of a protected right and may suggest recommendations to the state to remedy the violation. The victim requirement is upheld. The IACHR is unable to make legally binding decisions. It may only submit a case to the IAC for a binding ruling if the country involved has accepted the IAC's jurisdiction. Unlike the IAC, which can only apply the ACHR, the IACHR can also apply other conventions, such as the Additional Protocol on Economic, Social, and Cultural Rights. Before the IAC individual could not submit a complaint. Only States Parties and the IACHR can bring a case before the IAC. If the IAC determines that a right protected by

the ACHR has been violated, the IAC orders that the injured person be allowed to exercise that right. It may also order, if necessary, that the consequences of the measure or circumstance that resulted in the violation of such right be corrected and that the injured party be compensated fairly (Van Aaken, 2005, pp. 39–40).

The specificity of the *locus standi* of the right to an adequate environment in the inter-American system of human rights protection refers to the fact that the protection of this right is mainly considered from the aspect of the rights of indigenous peoples, which justifiably leads to a dilemma regarding the status of the individual in the aforementioned context.

European Court of Human Rights

European Convention on Human Rights [ECHR] does not expressly recognize the RtAE. European Court of Human Rights [ECtHR], with the mandate to rule on individual or State applications alleging violations of the rights protected by the ECHR, has accepted an indirect recognition of the subject right when protecting the following human rights: the right to life, the right to protection of private and family life, home and correspondence, the right to free enjoyment of the property and the prohibition of torture (Dogaru, 2014, pp. 1349–1351).

Article 34 of the ECHR states that

the Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto (European Convention on Human Rights, 1950).

In the context of Article 34 of the ECHR, the term “victim” refers to the person or persons who are directly or indirectly impacted by the claimed breach. Concerning this issue, the jurisprudence of the ECHR has established that complaints based *in abstracto* violations of the ECHR are not admissible.

Individual complaints before the ECtHR are further limited by Article 35 of the ECHR (as amended by Protocol 14 and Protocol 15),

which outlines a set of admissibility criteria: first, domestic remedies should be exhausted before bringing the case to the ECtHR and the application should be submitted within four months from the date on which the final decision was taken; second, the ECtHR will not consider any application that is either anonymous or has already been considered by the ECtHR or another international court; and third, if an individual application is in breach of the ECHR or the applicant has not suffered prejudice, the ECtHR must declare it inadmissible; and, finally, the ECtHR has the authority to reject an application that is estimated to be objectionable under the article 35 of the ECHR at any stage of the proceeding (ECHR, Practical Guide on Admissibility Criteria, 2022). The ECtHR's decision is binding on the parties, and the Committee of Ministers is responsible for supervising the execution of the judgements.

Even though the ECtHR is currently the most successful regional court in the context of the protection of the right to an adequate environment, this fact must be viewed through the prism of the circumstances that the measures issued by the ECtHR are mainly reduced to compensation and that there is a clear hesitation of ECtHR in the context of determining the concrete measures aimed at environmental protection (Mladenov, 2017, p. 157).

Conclusion

According to international practice, the insignificance of international agreements granting direct RtAE leads to the use of other human rights, such as the right to life, the right to private and family life, the right to health, the right to an adequate standard of living, and minority rights, as the basis for claims of environmental degradation-related rights violations.

Due to the conducted analysis of the *locus standi* provisions of the universal and regional systems of human rights protection, the capacity of the individual to bring the claim regarding the RtAE is rather limited. Every person has access to compliance mechanisms through the UN, European, American, and African conventions to uphold their rights through individual complaints. However, all these mechanisms depend on the State's initial commitment to the conventions as well as the prior application of all available domestic

remedies. Moreover, it is crucial to be aware that the absence of an international enforcement body and national courts' unwillingness to consider the recommendations of international committees weaken the force of many international resolutions. In terms of *locus standi* admissibility for individual complaint mechanisms, the system based on UN treaties seems to be the strictest, even though the UN treaties, as universal instruments, cover a huge geographical area and despite the frequently unfavourable socioeconomic and educational conditions that may influence individual complaints. As the result, it is not unexpected that the system is not used to its full potential.

To grant individuals the means to seek the proper protection of the RtAE, the authors suggest that the RtAE should be codified as an autonomous human right at the global level through the provisions of the specific convention. This proposal presents numerous challenges, however, among which is defining an adequate environment as a protected object as well as the creation of an effective compliance mechanism. In terms of the last, we should consider the question will individuals be granted access to the International Court of Justice. All these challenges that arise from the complex nature of the RtAE should be the subject of future research.

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***Locus standi* prava na odgovarajuću životnu sredinu – univerzalni i regionalni mehanizmi zaštite ljudskih prava**

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Sažetak

Bez obzira na činjenicu da pravo na odgovarajuću životnu sredinu predstavlja deo međunarodnog prava više od 50 godina i dalje postoje brojni izazovi u njenoj delotvornoj sudskoj zaštiti. Među pitanjima koja značajno utiču na ostvarivanje prava na odgovarajuću životnu sredinu jeste uvtrđivanje kruga subjekata koji mogu da zahtevaju sudsku zaštitu predmetnog prava, kao i pitanja koja se odnose na postupak zaštite i delotvorne pravne lekove. U svetlu navedenog, rad pruža doprinos aktuelnoj diskusiji kroz analizu i uvid u glavne karakteristike postupaka, kao i kriterijume prihvatljivosti predstavke pred međunarodnim, univerzalnim i regionalnim sudskim i kvazisudskim nadzornim telima. Cilj rada jeste sagledavanje prava na odgovarajuću životnu sredinu sa aspekta efikasne sudske zaštite, delotvornih pravnih lekova i, posledično, koherentnosti koju međunarodni nadzorni mehanizmi unose u globalni pravni poredak.

Ključne reči: pravo na odgovarajuću životnu sredinu, locus standi, uslovi prihvatljivosti predstavke